

**QUARTERLY ATTORNEY REPORT
GENERAL DISTRICT
January 2004**

TO: CRWCD BOARD OF DIRECTORS

FROM: PETER C. FLEMING, GENERAL COUNSEL
JILL C.H. MCCONAUGHY, ASSOCIATE COUNSEL
KIRSTIN E. MCMILLAN, STAFF COUNSEL

Dear Directors:

This report identifies matters for discussion at the River District's January 20-21, 2004, meeting. A separate Confidential Report (Attachment A) addresses confidential matters. The information in this report is current as of January 8, 2004, and will be supplemented as necessary before or at the Board meeting.

I. EXECUTIVE SESSION

The following is a list of matters that qualify for discussion in executive session pursuant to C.R.S. §§ 24-6-402(4)(b), 4(e), and 4(f).

- A. Blue River Decree - Negotiations with Denver/Summit County.
- B. C-BT Litigation, Green Mountain Reservoir, Federal District Court.
- C. Windy Gap Firing Project.
- D. Denver's North-End/Moffat System Project.
- E. City of Golden (Vidler Tunnel Company) v. Simpson, Case No. 03CW176, Water Division 5.
- F. SECWCD's Application to Make First Enlargement of Boustead Tunnel Absolute, Case No. 02CW324, and Application for Second Enlargement of Boustead Tunnel, Case No. 02CW365, Water Division 5.
- G. Application of Flattops Water Company, Upper Eagle Regional Water Authority, and Eagle River Water & Sanitation District, Case No. 03CW159, Water Division 5.
- H. Shoshone Power Plant - Call Reduction Issues.
- I. Black Canyon National Monument:
 - 1. Federal Reserved Right, Case No. 01CW05, Water Division 4.
 - 2. Case No. 03SA321, Appeal to Colorado Supreme Court of Order on Stay in Case No. 01CW05.
 - 3. TU/WRA Federal Lawsuit regarding Black Canyon Reserved Right.
 - 4. CWCB's Instream Flow Claim for the Black Canyon, Case No. 03CW265, Water Division 4.
- J. UGRWCD's Application for Recreational In-Channel Diversion, Case No. 02CW38, Water Division 4.

- K. Application of Steamboat Springs for Recreational In-Channel Diversion, Case No. 03CW36, Water Division 6.
- L. Upcoming River District Diligence Deadlines - Juniper/Cross Water Rights, Water Division 6.
- M. Colorado River Compact - Upper Basin Delivery Issues.
- N. Personnel Matters.

II. CONSENT AGENDA

We propose that the Board approve the following items on a consent agenda. Of course, the Board may choose to remove any item from the consent agenda for separate discussion.

A. Application for Adjudication of the Aspinall Unit Subordination Agreement, Case No. 03CW263, Water Division 4.

Pursuant to the Board's prior direction, we filed a joint application with the Upper Gunnison River Water Conservancy District at the end of December to adjudicate the June 1, 2000, Aspinall Unit Subordination Agreement. A copy of the application is included as Attachment B to this memo. Statements of opposition to the application are due by the end of February. We will keep the Board up-to-date on the progress of the application. *We request that the Board ratify the application as filed by adoption of the Legal Consent Agenda.*

B. New Purchase and Sale Contract for River District's Lot 4, Devereux Road.

Pursuant to direction from the Board's Executive Committee, we entered a purchase and sale contract dated December 22, 2003, with Cody Henry for the River District's Lot 4. The sale is scheduled to close on March 18, 2004. A copy of the contract is included as Attachment C to this memo. *We request that the Board ratify the contract by adoption of the Legal Consent Agenda.*

C. Agreement with Warners Regarding Terminated Contract for Sale of Lot 4, Devereux Road.

Pursuant to direction from the Board's Executive Committee, we entered a letter agreement with Rick and Kathie Warner executed on December 26, 2003, resolving outstanding issues concerning their terminated contract with the River District for the purchase of Lot 4. A copy of the letter agreement is included with your Board material as Attachment D to this memo. *We request that the Board ratify the letter agreement by adoption of the Legal Consent Agenda.*

D. Special Counsel Rate Increases.

We have received new rate schedules for Leavenworth & Karp (effective January 1, 2004), Balcomb & Green (effective December 1, 2003), and Holland & Hart (effective January 1, 2004).

Lee Leavenworth's billing rate will increase from \$175 to \$185 per hour, and the rates for Leavenworth & Karp's more junior attorneys will range from \$110 to \$155. David Hallford's billing rate will increase from \$165 to \$170 per hour, and the rates for Balcomb & Green's more junior attorneys will range from \$130 to \$165. The billing rate for Peter Houtsma and Mike Brennan will increase from \$275 to \$295, and Anne Castle's rate will increase from \$270 to \$285. The hourly billing rates for Holland & Hart's other attorneys will range from \$180 to \$280. The River District's policy on special counsel requires that the Board approve rate increases of special counsel. We have reviewed the proposed new billing rates and believe that the rates are reasonable. *We request that the Board approve the rate increase by adoption of the Legal Consent Agenda.*

III. GENERAL & GOVERNANCE MATTERS

A. Update on State Engineer's Water Administration Fee Program Rules Required by S.B. 03-278.

Pursuant to the Board's direction, we submitted a prehearing statement to the State Engineer's Office on November 14, 2003, expressing concern about certain aspects of the State Engineer's proposed rules for the Water Administration Fee Program. Our primary concern involved the fee charged for agricultural water rights. Pursuant to S.B. 03-278, agricultural water rights are charged a lower fee than other water rights. However, the draft rules required the owner of a water right decreed for agricultural and domestic purposes to both certify that the water right is not being used for domestic purposes and agree not to contest abandonment of the domestic use portion of the decree in order to obtain the benefit of the lower agricultural rate established by the statute. In our prehearing statement, we proposed that the rules base the fee on the predominant use of the water right and argued that an owner should not be required to permanently abandon a portion of a water right in order to assist the state in implementing a temporary fee structure.

In addition, we requested that: (1) the rules limit the applicability of the rules and definitions of defined terms set forth in the rules to the Water Administration Fee Program and expressly disclaim the relevance of the rules to other proceedings; (2) the rules capitalize all defined terms to provide clarity; (3) the definition of "owner" be amended to accord with the statutory definition and eliminate the possibility that an individual who merely coordinates the diversion of a water right with multiple owners or the diversion of multiple water rights at a common point would be considered an "owner"; (4) the definition of "direct flow water right" and "storage water right" be clarified; (5) the fire protection exemption be revised to apply only to rights decreed solely for fire protection; (6) the rules designate the General Manager as the representative owner of an entity with a General Manager and the President as the representative owner only if the entity has no General Manager; and (7) the timeline for appeals be clarified.

Several other parties filed prehearing statements arguing that the rules are unconstitutional because: (1) the fees actually operate as a tax and therefore violate TABOR, which requires a public vote before a tax is imposed on a property right; (2) the rules violate equal protection because there

is no rational basis tied to the cost of administration for charging a different fee for agricultural and non-agricultural water rights; and (3) the rules violate due process because they are too vague.

On December 1, 2003, the State Engineer held a rulemaking hearing to promulgate the proposed rules. The River District participated in the hearing, along with Clinton Ditch & Reservoir Company, Eagle Park Reservoir Company, Eagle River Water and Sanitation District, Upper Eagle Regional Water Authority, Vail Associates, the Town of Gypsum, Southeastern Colorado Water Conservancy District and John Mattingly, *pro se*. The River District presented the arguments set forth in its prehearing statement.

On December 3, 2003, the Attorney General circulated the final rules adopted by the State Engineer. The final rules incorporated most of the River District's suggestions. The State Engineer declined to adopt a predominant use standard for determining the appropriate fee for water rights decreed for agricultural and domestic uses, but did eliminate the requirement that the owner agree not to protest the abandonment of the domestic use portion. A copy of the final rules is included in your Board material as Attachment E.

B. Colorado Water Conservation Board's Proposed Recreational In-Channel Division Policy.

We submitted written comments on the CWCB's proposed Recreational In-Channel Diversions (RICD) Policy Manual in accordance with the discussion contained in our October 2003 General Report to the River District Board. We also participated extensively at the CWCB's November 19, 2003, informal workshop on the RICD Policy. A few of our arguments appear to have been well received (some much more than others). In particular, the CWCB Board members seemed to agree that the RICD Policy should not ignore the intent of the appropriator and that the RICD Policy should include more detail on what standards the CWCB uses to determine whether a RICD "impairs" compact development. Nevertheless, the CWCB adopted staff's proposed RICD Policy on November 21, subject to further review. Please let us know if you would like a copy of the adopted RICD Policy.

C. Basin of Origin Protection Measures in Other Western States.

The Board previously has indicated a desire to explore new strategies for basin of origin protection. We researched existing law review articles and state statutes to determine what legislative methods other western states have used to implement basin of origin protection. We have not researched the relative success of the measures, some of which clearly would not fit within the general framework of Colorado's existing water law. Our findings are summarized below as a discussion aide. A more detailed memo is included in your Board material as Attachment F. We suggest that if the Board wishes to discuss this issue that it do so in the External Affairs portion of the meeting agenda.

- *Arizona*: allows irrigation districts, agricultural improvement districts and water users' associations to veto requests to use water outside the entity's boundaries.
- *California*: has many area of origin protection statutes which: (1) reserve water necessary for development to the county of origin; (2) protect water needed by the watershed of origin from use by the Central Valley Project's facilities; (3) applies area of origin protection to the Delta Protection Act; and (4) applies area of origin protection to statutorily defined "Protected Areas."
- *Idaho*: prohibits a change in use if such change negatively impacts the area or watershed of origin and prohibits a change from agricultural use if such change would significantly affect the agricultural base of the local area.
- *Kansas*: prohibits transfers unless the benefits outweigh the burdens or an emergency exists.
- *Montana*: allows only the state to appropriate large amounts of transbasin water or transbasin water from certain basins.
- *Nebraska*: considers whether the public interest requires denying a transbasin diversion and prohibits transbasin diversions altogether unless the river is at least 100 feet wide.
- *New Mexico*: has no explicit basin of origin protection statute, but regulates such transfers by considering the public interest, including an individual's right to use the water in the upper valleys of several streams.
- *Oklahoma*: forbids transbasin transfers that interfere with the existing or future uses of the area of origin and requires an examination of these needs every five years.
- *Oregon*: requires legislative approval of transbasin transfers: (1) in excess of 50 cfs; (2) out of certain basins; and/or (3) not historically used by a city.
- *Texas*: prohibits state funding of projects that will deprive the area of origin of water foreseeably needed in the next fifty years, requires a notice and comment procedure and mandates a stringent inquiry for all transbasin diversions.
- *Wyoming*: conducts a balancing test before permitting a transbasin diversion.

D. Risk Management and Contracting Process – Delegation of Authority to General Manager and General Counsel to Approve Substantive Changes to Low-Risk Contracts.

In order to incorporate more flexibility into our contracting procedures and to minimize the number of contracting issues the Board must address, we recommend that the Board authorize the General Counsel, in consultation with the General Manager, to approve substantive changes to the standard form contract for low-risk work.

We have been working with Ralph Grover of Keith & McKuhn to review and refine our risk management and contracting procedures. It is readily apparent that our standard form contract does not work for all types of contracts, and we routinely have to ask the Board to approve relatively minor yet substantive changes to the standard form contract. In many, but not all, cases, the contracts in question do not appear to involve substantial risks for the River District. For example, there are three contracts on the Board's agenda for this meeting, all of which involve changes to the insurance requirements for relatively low-risk work (Costello & Company is for auditing services, Southwest Data Center is for website development, and Keith & McKuhn is for risk management consulting).

The most common types of substantive changes include changes to the insurance requirements and limits on the contractor's total liability under the contract. Low-risk work normally would involve relatively low-cost contracts (under \$50,000.00) for administrative services, financial services, information services, and technical consulting services, including hydrology and conceptual-level engineering work that does not involve significant field-work. Design and construction work would not be considered low-risk. Of course, the General Manager and General Counsel would retain the ability to refer any issues to the Board as they deem appropriate. We also anticipate refining this proposed delegation as we work with our consultant to develop new proposals for risk management and contract processing.

E. Approval of Proposed Changes to Standard Form Contract with Costello & Company, Inc.

At the September Special Joint Meeting, the Board selected Costello & Company, P.C. to audit the River District's basic financial statements for the years 2004 through 2007, and to observe selected portions of the work performed by others for the year ending December 31, 2003. The Board approved payment not to exceed \$12,500 for the year ending December 31, 2004, and not to increase more than 5% per year for the next three years. Costello & Company has requested that we reduce some of the insurance requirements in the standard form contract. Specifically, they have requested that we reduce the automobile insurance requirement from \$1,000,000 to \$500,000 (it can be increased to \$1,000,000 at a cost of \$149.00) and reduce the professional liability insurance requirement from \$1,000,000 to \$250,000 (it can be increased to \$1,000,000 at a cost of \$1,677.00). By law, auditors are only required to maintain professional liability insurance of \$150,000, and the rates have increased substantially as a result of the Enron scandal. *We recommend that the Board approve the requested revisions because they are justified by the nature of the work and the cost of the contract.*

F. Approval of Proposed Changes to Standard Form Contract with Southwest Data Center, Inc.

In September 2002, the River District received \$20,000.00 for its Trust and Agency Account from the Bureau of Reclamation, pursuant to an Assistance Agreement, to conduct activities related to the recovery of endangered fish for the Colorado River System as outlined in the Upper Colorado River Endangered Fish Recovery Program. The Board recently approved a contract between the River District and Southwest Data Center, Inc. to implement the activities required by the Assistance Agreement and to disburse the \$20,000.00 from the Trust and Agency Account. Specifically, the contract requires Southwest Data Center, Inc. to develop an interactive, web-based map of the Colorado River Basin for the Colorado River Water Users Association's website and to work with the U.S. Fish and Wildlife Service's Recovery Program to customize the web-based map for use by the Recovery Program.

Southwest Data Center, Inc. requested various changes to the River District's standard form contract, including the deletion of the standard requirements for: (1) Workers' Compensation and Employer's Liability Insurance; (2) Commercial General Liability Insurance; (3) Commercial Automobile Bodily Injury & Property Damage Liability Insurance; and (4) Professional Liability Insurance. Southwest Data Center, Inc. requested the above changes because it does not carry insurance. *We recommend that the Board approve the proposed revisions to the standard form contract because the work appears to present a very low risk.*

G. Approval of Proposed Changes to Standard Form Contract with Keith & McKuhn, LLC.

As discussed previously, we have initiated primary discussions with Ralph Grover of Keith & McKuhn regarding a review of the River District's risk management and contracting process. Mr. Grover requested various changes to the River District's standard form contract. We propose the following revisions to address his concerns: (1) the consultant's role is advisory in nature and the River District is responsible for the ultimate implementation and use of materials produced with consultant's assistance; (2) subject to the Open Records Act, the River District will not disclose consultant's confidential and/or proprietary information to a third party without consultant's prior written consent, will take reasonable steps to protect consultant's confidential and/or proprietary information, and will return such information to consultant upon request or the termination of the agreement; (3) the River District agrees that it does not obtain a license in consultant's patented or copyrighted material from work pursuant to the contract; (4) the confidentiality and copyright provisions survive and continue after the termination of the agreement or the completion of the work; (5) consultant is responsible for his negligent actions, errors and omissions and agrees to indemnify and hold harmless the River District for such actions, errors and omissions; (6) delete the Professional Liability and Personal Injury Insurance requirements; (7) remove the Workers' Compensation Insurance requirement because Mr. Grover represents that he is the sole employee

of Keith & McKuhn; and (8) Keith & McKuhn will purchase Commercial Automobile Bodily Injury and Property Damage Liability Insurance for this contract at its own expense.

We proposed these amendments to address Mr. Grover's requests because we believe the proposed work presents a relatively low risk to the River District and the cost of the contract is relatively low. *We therefore recommend that the Board approve the revisions to the River District's standard form contract for the agreement between the River District and Keith & McKuhn related to risk assessment and the River District's contracting process.*

IV. WATER MATTERS BY BASIN

A. Gunnison River Basin.

1. Black Canyon Litigation.

a. Reserved Rights Application, Case No. 01CW05 and Case No. 03SA321, Water Division 4.

On November 3, 2003, the River District, together with other parties, including the CWCB, State Engineer and the Upper Gunnison River Water Conservancy District filed a direct appeal of the Division 4 Water Court's order granting a stay of the reserved rights litigation for the Black Canyon (Case No. 01CW05), pending resolution of the new complaint filed by certain environmental groups in the Federal District Court (Case No. 03-WY-1712, discussed below). The appeal was made to the Colorado Supreme Court under C.A.R. 21 and requests that the court issue a rule to show cause why it should not require the water court to reverse its order granting the stay of the reserved rights case. We argued that the supreme court should require the reversal of the stay order because the order constitutes an effective abdication of the water court's primary jurisdiction over the quantification of the Black Canyon Federal Reserved Right and ignores the prejudice to the water users and the State of further delay in the quantification of the reserved right for the Black Canyon.

On November 10, 2003, the Colorado Supreme Court granted the procedural part of the Rule 21 Petition – which means only that the court will listen to our argument. The court set a briefing schedule that originally required the environmental parties and the United States to file a brief by December 26, 2003. The United States thereafter filed a motion requesting an additional month to file its answer. The court extended the deadline for both the United States and the environmental parties up to and including January 26, 2004. The River District, and other petitioners, have forty-five days from the receipt of the answer in which to respond. We plan to coordinate a responsive brief with our co-petitioners.

Somewhat ironically, the supreme court's acceptance of the Rule 21 Petition impacts the water court case because the order to show cause why the stay should not be reversed actually has

the automatic effect of staying all further proceedings by the water court until further action is taken by the supreme court. Accordingly, the water court vacated a previously scheduled status conference for December 17, 2003. Nevertheless, the supreme court review process should not take as much time as the federal district court case filed by the environmental groups. We will continue to work with our co-petitioners to achieve a prompt and favorable outcome in the reserved rights litigation.

b. Federal Complaint of Environmental Groups, Case No. 03-WY-1712.

(As an aside, this case was assigned a Wyoming docket number because the assigned judge, sitting by designation, is a federal judge from the District of Wyoming).

New developments also have occurred in the federal lawsuit filed by the environmental groups. First, the National Parks Conservation Association and Environmental Defense have joined the existing plaintiffs. In early December, the expanded group filed an amended complaint wherein they restated their initial contentions and additionally argued that the United States unlawfully delegated its authority and responsibility under the National Park Service Act and the Black Canyon Act to the State of Colorado.

On December 22, 2003, the United States filed an amended motion to dismiss arguing that (1) dismissal is required because the federal court lacks jurisdiction over the discretionary actions of the United States to resolve pending litigation, (2) resolution of the environmentalists' claims in federal court would infringe upon the water court's authority, (3) NEPA does not apply to the United States' development of a litigation strategy, and (4) the United States' decision to reduce the amount of water claimed for an un-quantified reserved water right does not constitute a disposition of federal property. Finally, in late December, the CWCB, the Colorado State Engineer and Division Engineer for Water Division 4, the Colorado Division of Wildlife, and the Colorado Farm Bureau filed unopposed motions to intervene in the federal lawsuit and join in the United States' motion to dismiss.

The Board may wish to discuss these issues further in executive session.

c. CWCB Appropriation of Peak Instream Flow for the Black Canyon, Case No. 03CW265, Water Division 4.

We previously reported that the CWCB declared its intent to appropriate a peak instream flow water right for the Black Canyon, consistent with the April 2, 2003, MOA between the United States and Colorado. The CWCB held an administrative hearing on its appropriation on November 19, 2003, and, pursuant to the Board's prior direction, we participated by filing prehearing statements and by providing testimony at the hearing. Although the CWCB did not adopt all of our recommended changes to the proposed findings of fact drafted by the CWCB staff, the hearing went very well and the CWCB adopted findings of fact that we support. The next step in the process is

for the CWCB to adjudicate the peak flow claims in the Division 4 Water Court. The CWCB filed an application in late December (Case No. 03CW265) that appears to be consistent with the findings adopted by the CWCB at the November hearing. Statements of Opposition to the application are due by the end of February. *We recommend filing a Statement of Opposition to monitor the case and support the CWCB's efforts to implement the April 2, 2003, MOA. The Board may wish to discuss this matter further in executive session.*

2. Upper Gunnison River Water Conservancy District RICD, Case No. 02CW38, Water Division 4.

This case involves the UGRWCD's application for a Recreational In-Channel Diversion ("RICD") on the Gunnison River. As previously reported, we participated in the 5-day trial (September 15-19, 2003, in Gunnison) in support of the UGRWCD. We also participated in the post-trial process by filing a closing brief in support of the UGRWCD (you should have received a copy of our closing brief in a prior mailing). We are pleased to report that, on December 26, 2003, the Division 4 Water Court (Judge Patrick) granted the application in full. Judge Patrick also issued separate findings of fact and conclusions of law that comports with the arguments we asserted in support of the UGRWCD at trial and during the briefing process. A copy of the Judge Patrick's Findings of Fact and Conclusions of Law is included in your Board material as Attachment G. In summary, Judge Patrick ruled that:

- a. The CWCB's Findings of Fact on a RICD application may be overcome by a preponderance of the evidence. The Applicant met this burden.
- b. 250 c.f.s. for the Gunnison course would attract experienced boaters during times of low flow but would not do so when flows were higher elsewhere. Therefore, more than one flow rate was appropriate for the RICD.
- c. The applicant for a RICD has the right to determine the size and scope of the RICD, subject to meeting customary requirements of maximum utilization and prevention of waste. The Gunnison RICD will impact future upstream development by demanding up to 41% of the available supply above the course but it will not constitute waste or speculation.
- d. The determination of compact impairment requires *material* impairment, not just any impact as argued by the CWCB's expert. The flow rates requested by the applicant will not impair the development of Colorado's compact entitlement.

If the CWCB wishes to appeal the case, it must file a notice of appeal by the second week of February. *The Board may wish to discuss this matter further in executive session.*

B. Colorado River Basin.

1. C-BT Litigation, Green Mountain Reservoir, Federal District Court (49N2782) (a/k/a the “Heeney Slide Litigation”).

We currently are waiting to receive the reply briefs of the United States and the Northern Colorado Water Conservancy District on their motions to dismiss our petition (due January 12). The United States and Northern argued in their motions to dismiss that there is no present controversy and the case is not ripe because (1) the Heeney Slide release restriction was an informal temporary action, (2) there has been no formal final agency action by the Bureau of Reclamation regarding the Heeney Slide, (3) the petitioners did not claim any damages from the release restriction, and (4) the petitioners’ future alleged harm is hypothetical because 2002 was an extreme drought year.

We worked with Holland & Hart and the other petitioners on a comprehensive response brief that we filed on December 8, 2003. Our response points out that, contrary to the contentions of the United States and Northern, the case does involve a very real and live dispute – one that the court can and should act to resolve, just as federal courts routinely do in declaratory judgment type-actions. We argued in our response brief that (1) disputes over the interpretation of Senate Document 80 have been considered several times by the federal court under its retained jurisdiction of the Blue River Decree, (2) the Bureau of Reclamation’s decision on operational restrictions involving Green Mountain Reservoir would be capable of “repetition yet evading review” in the future if the court does not hear the petitioners’ current claims, (3) although no damages were claimed, the West Slope did suffer actual injury in 2002 from the Heeney Slide release restriction, and (4) potential future injury is not hypothetical because drought conditions are always a risk in Colorado. A copy of our response brief with exhibits is included with your Board material as Attachment H. The reply briefs of the United States and Northern are due on January 12, 2004, so we may have additional information to report at the Board meeting.

We previously reported that the State’s motion to intervene in the lawsuit is opposed by the United States and Northern. The State’s motion was also opposed by Denver, Colorado Springs, and Englewood. It is not entirely clear if the briefing on the motion is complete because the United States and Northern filed a motion for permission to file a “sur-reply” brief or for a hearing in November. The court has not ruled on that motion or the State’s motion for intervention. *The Board may wish to discuss this case further in executive session.*

2. Windy Gap Firing Project.

We continue to work closely with Grand County and the Middle Park Water Conservancy District on the Windy Gap Firing Project proposed by the Municipal Subdistrict of the Northern Colorado Water Conservancy District. The Windy Gap Project is located on the Colorado River downstream of the confluence of the Colorado and the Blue Rivers (so, downstream of the confluence of the Colorado and Fraser Rivers as well). In effect, the Firing Project seeks to divert

additional yield of the Fraser River because the yield of the Colorado and Blue Rivers at that location is already commanded by other senior rights. As previously reported, the primary West Slope concerns about the proposed project include potential water quality impacts in Grand County, reduced stream flows below Windy Gap Reservoir, obtaining a more complete understanding of the impacts to the C-BT system from the possible “prepositioning” of C-BT Project water in new non-project Windy Gap storage facilities on the Front Range, and ensuring that the NEPA process fully reviews the cumulative impacts of the Windy Gap Firming Project and Denver’s proposed North End/Moffat System Improvement Project. The initial NEPA scoping document has been compiled by the Subdistrict’s consultant and contains a summary of all of the comments on the project (including comments submitted by the River District). The scoping document does not indicate how or even whether the federal action agency – in this case, the Bureau of Reclamation – intends to address the comments. The next step in the NEPA process is the study and compilation of a draft environmental impact statement. That process is expected to take a good bit of time but we will continue to participate in the process in order to protect the West Slope’s interests. *The Board may wish to discuss this matter further in executive session.*

3. Denver’s North End/Moffat System Improvement Project.

As reported previously, this project is moving almost simultaneously with the Windy Gap Firming Project. Both projects seek to divert more water from upper Colorado River Basin (in particular, the Fraser River) across the Continental Divide. Likewise, both projects seek to increase the yield of their transmountain diversions, primarily by building additional storage structures on the Front Range. The areas on the Front Range that are proposed to be served by the new transmountain water also are very close to each other. The federal action agency for Denver’s project is the U.S. Army Corps of Engineers – the primary agency in charge of issuing Clean Water Act Section 404 “Dredge & Fill” Permits. We are working closely with Grand County and the Middle Park Water Conservancy District on the NEPA process for this project and have submitted comments to the Corps of Engineers regarding the NEPA scoping. An initial scoping summary has been prepared by the Corps of Engineers, and we will continue to participate in the NEPA process. *The Board may wish to discuss this matter further in executive session.*

4. Denver - Blue River Decree Compliance Negotiations.

We have continued to meet monthly with Denver, Summit County, and the Middle Park Water Conservancy District to resolve the West Slope’s concerns about Denver’s possible non-compliance with the terms and limitations of the Blue River Decree. The negotiations moved slowly at first but are now entering a more substantive phase. In this regard, the parties propose to share proprietary information to facilitate the frank discussions necessary to reach a settlement. Denver has proposed a confidentiality agreement to cover statements made and work-product produced during the negotiations. The draft confidentiality agreement is included in your Board material as Attachment I. The main points of the agreement provide that:

- a. statements and “work product” made and produced during the course of the negotiations shall remain confidential and cannot be used by the parties in any subsequent litigation;
- b. in any subsequent litigation, a party will not attempt to compel the other parties to divulge confidential information shared during the negotiations; and
- c. underlying data used to develop work product shall remain open to discovery and the parties may use their own work product without restriction.

We believe the draft Confidentiality Agreement is reasonable and will help facilitate the negotiations with Denver. *We recommend that the Board authorize staff to execute the agreement. This matter is discussed further in the Confidential Report, and we recommend that the Board discuss this item in executive session.*

5. Shoshone Power Plant - Call Reduction Issues.

This matter is discussed in the Confidential Report.

6. City of Golden (Vidler Tunnel Co.) v. Simpson, Case No. 03CW176, Water Division 5.

Golden is the owner of the Vidler Tunnel Company which operates a transmountain diversion project in upper reaches of the Snake River Basin, upstream of Dillon Reservoir. The primary controversy centers on a long-simmering issue throughout the water rights community about whether an entity is entitled to divert its junior water rights when it has not yet exercised its senior water rights (a.k.a. the “senior first, junior second” dispute). We currently are not particularly interested in that subject, but there has been some discussion that issues regarding the ability/inability of the Vidler Tunnel to divert prior to a fill of Green Mountain Reservoir could be raised in the case. We therefore have been monitoring the case in order to protect the West Slope’s interests in Green Mountain Reservoir. It appears that an informal agreement may be workable with the existing parties to keep those issues out of the pending litigation. *We suggest that the Board discuss this matter further in executive session.*

7. Southeastern Colorado Water Conservancy District’s Application to Make Absolute the First Enlargement of the Boustead Tunnel, Case No. 02CW324, and Application for Second Enlargement of Boustead Tunnel Water Right, Case No. 02CW365, Water Division 5.

As reported previously, these cases are of interest to the River District and its constituents primarily to protect the priority of Ruedi Reservoir (the West Slope’s compensatory storage facility for the Fry-Ark Project) and to protect the West Slope from the detrimental impacts of increased

transmountain diversions. We are pleased to report that we are now parties in both cases because the Division 5 Water Court recently granted our motion to intervene in Case No. 02CW324, over the objection of the Southeastern District. We have scheduled a meeting with Southeastern, the U.S. Bureau of Reclamation, and the State and Division 5 Engineers for January 23 to discuss the water rights administrative issues raised by the two cases. *The Board may wish to discuss these cases in executive session.*

8. Application of Flattops Water Co., Upper Eagle Regional Water Authority, and Eagle River Water & Sanitation District, Case No. 03CW159, Water Division 5.

This case involves the diversion of water from Water Division 6 for use in Water Division 5. We filed a statement of opposition in this case to ensure that any decree (1) does not result in an expansion of the amount of water the Flattops Water Co. has historically diverted out of the Yampa River Basin into the Colorado River Basin, and (2) ensures accurate accounting for water delivered into the Colorado River Basin and exchanged upstream in the Eagle River Basin. We recently met with the Applicants' attorney and consultant to discuss possible resolution of the case. *We recommend that the Board discuss this case further in executive session.*

9. River District's Diligence Application, Case No. 03CW41, Water Division 5.

We filed this diligence application on over 45 water rights at the end of February 2003. We are working to resolve the concerns of the three objectors, MidCon Realty, Eleanor Ruchti (*pro se*) and Nancy Allen (*pro se*). MidCon owns water rights in the Coal Creek Basin (tributary to the Crystal River) that are junior to the River District's West Divide Project water rights. We are analyzing the potential effects of the West Divide Project water rights on MidCon's water rights and exploring ways to address MidCon's concerns. The *pro se* objectors own property on the White River and are concerned that the Strawberry Creek Pipeline would exacerbate erosion problems on their property by increasing the amount of water in the White River. We have tried to alleviate their concerns by informing them that the Strawberry Creek Pipeline is a pumping pipeline that would remove water from the White River during the spring run-off, but we have not received any response. We received the Division Engineer's summary of consultation which raised a number of minor concerns, and we are working on a response.

10. Diligence Application of Peak Ranch, Inc., Case No. 02CW100, Water Division 5.

This is an application for a 4,593.93 acre-foot reservoir on Muddy Creek upstream of Wolford Mountain Reservoir. Pursuant to the Board's direction, we have negotiated a stipulation with the applicant that prohibits the use of the water right outside of the drainage basin of the Colorado River and its tributaries within the River District's boundaries except with the River District's written consent.

11. Agreement with West Divide Water Conservancy District.

Pursuant to the Board's direction at the July meeting, we sent a letter to the West Divide Water Conservancy District clarifying our understanding of the 1984 Master Agreement between the River District and West Divide. In summary, the Master Agreement provides that: (1) the River District will transfer ownership of the West Divide Project water rights to West Divide upon request; (2) West Divide will not transfer ownership of the water rights to any private person or entity except under an exchange agreement to accomplish the purposes of the West Divide Project and to put the water rights to beneficial use within West Divide's boundaries; (3) West Divide's contractors may file water court applications involving the West Divide Project water rights, provided that the decree states that the water rights are owned by West Divide and leased by the applicant; (4) the River District and West Divide are jointly and severally liable responsible for diligence actions; and (5) the River District will not enter into any agreement with any other person or entity that would deny West Divide ownership, control or exclusive use of the West Divide Project water rights.

Our letter requested that West Divide agree to obtain the River District's written consent prior to utilizing any of the West Divide Project water rights, filing water court applications to change the water rights, or entering into stipulations that limit the use of the water rights. We recently received a response from West Divide, indicating that West Divide does not want to obtain the River District's written consent prior to using the West Divide Project water rights. West Divide has agreed, however, to notify the River District of its intent to use any such water and provide the River District an opportunity to comment on West Divide's use. In the event of a change case, West Divide's notification will likely include a request to transfer title of the subject water right to West Divide. We believe that West Divide's agreement to notify the River District of its intended use and allow the River District an opportunity to comment is sufficient to allow the River District to monitor West Divide's use of the water rights subject to the Master Agreement.

West Divide also requested that the River District transfer title of the Avalanche Canal and Siphon water right to West Divide. West Divide currently uses the Avalanche Canal and Siphon water right as part of its augmentation plan, which is the subject of two water court applications in Cases No. 02CW123 and 02CW281, Water Division 5. We filed statements of opposition in both of those cases because they identify the River District's marketed water supplies as a potential source of augmentation water and involve the use of the Avalanche Canal and Siphon water right. We transferred title to the Avalanche Canal and Siphon water right to West Divide by a Quit Claim Deed, as required by the Master Agreement. We also entered into Stipulations withdrawing the River District's statements of opposition in Cases No. 02CW123 and 02CW281.

C. Yampa and White River Basins.

1. City of Steamboat Springs, RICD Application, Case No. 03CW36, Water Division 6.

Steamboat Springs filed an application at the end of December for a recreational in-channel diversion. The application claims various flow rates for the RICD throughout the whitewater season. We understand that the Upper Yampa Water Conservancy District has been negotiating a possible resolution of this case with the applicant. We have not yet had an opportunity to fully review the application or discuss the case with the applicant, but we recommend that the River District examine the case to determine whether a position similar to the River District's position in the Upper Gunnison River Water Conservancy District's RICD case should be adopted – in other words, a position of support so long as the RICD will not impair Colorado's compact development and will promote the maximum utilization of the State's water resources. Statements of opposition to the application are due before the end of February. *The Board may wish to discuss this case further in executive session.*

2. River District's Diligence Applications for Rampart Reservoir, Second Fill, Case No. 03CW24, and Pot Hook Reservoir, Second Fill, Case No. 03CW30, Water Division 6.

We filed these applications for findings of reasonable diligence for Rampart Reservoir, Second Fill, and Pot Hook Reservoir, Second Fill, on March 31, 2003, and April 29, 2003, respectively. No statements of opposition were filed, but the Division Engineer requested some clarifications to our proposed rulings. We believe that we have resolved all of the Division Engineer's concerns without compromising the River District's rights. We plan to submit a revised proposed ruling to the Division 6 Water Judge prior to our next status conference scheduled for February 3, 2004.

3. River District's Diligence Deadline for Juniper-Cross Project Rights.

A diligence application for the Juniper-Cross Project is due at the end of June. The Juniper-Cross Project involves numerous water rights on the Yampa River, including Juniper Reservoir with a decreed capacity of 1,079,994 acre-feet and Cross Mountain Reservoir with a decreed capacity of 208,000 acre-feet. Pursuant to the Board's policies, a diligence application will be filed unless contrary direction is provided to staff. *This issue is discussed further in the Confidential Report.*

V. INTERSTATE MATTERS

A discussion of Colorado River Compact delivery issues for the upper basin states is included in the Confidential Report.

Attachments:

- A. Confidential Report from P. Fleming, January 8, 2004.
- B. Application for Adjudication of the Aspinall Unit Subordination Agreement, Case No. 03CW263, Water Division 4, dated 12/22/03.
- C. Purchase and Sale Contract for River District's Lot 4, Devereux Road, dated 11/17/2003.

- D. Letter Agreement with Warners regarding Terminated Contract for Sale of Lot 4, Devereux Road, dated 12/22/03.
- E. State Engineer's Water Administration Fee Program Rules, dated 12/4/03.
- F. Memorandum from K. McMillan to P. Fleming regarding Basin of Origin Protection, dated 10/28/03
- G. Findings of Fact, Conclusions of Law and Order and Decree, Case No. 02CW38, Water Division 4, dated 12/26/03.
- H. Consolidated Response to Motions to Dismiss, C-BT Litigation (49N2782), dated 12/8/03.
- I. Draft Confidentiality Agreement, Blue River Negotiations, dated 12/17/03 *nunc pro tunc* 10/23/03.